

(2011) 12 GAU CK 0062

In the Gauhati High Court

Case No : Regular Second Appeal No. 13 of 2003

State of Tripura & Ors.

APPELLANT

Vs

Mahanda Paul

RESPONDENT

Date of Decision : 16-12-2011

Acts Referred:

Civil Procedure Code, 1908 — Section 100
Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2013) 2 GLR 744 : (2012) 4 GLT 8

Hon'ble Judges : S.C.Das, J

Bench : Single Bench

Advocate : Advocate appeared for the Appellants: Mr. P. Dutta?? Advocate appeared for the Respondent: Mr. O.K. Biswas, Advocates appearing for Parties

Judgement

S. C. Das, J.

1. This second appeal, under Section 100 of the Code of Civil Procedure, is directed against judgment & decree, dated 30.9.2002 and 19.11.2002 respectively, passed by learned Additional District Judge, Kailashahar, North Tripura in Title Appeal No. 227/1999.

2. The fact, in short, necessary for disposal of this appeal, is that the respondent, as plaintiff, instituted Title Suit No. 3/1998 in the Court of Civil Judge, Senior Division, Kailashahar, North Tripura, inter alia stating that he was appointed to the post of Physical Instructor, Grade II vide Memorandum No. F.1(19)DSE/82 dated 25.02.1983, issued by the deftd. No. 4 and accordingly, he joined the post and performed his duty with all sincerity and devotion.

He was promoted to the post of Physical Instructor, Grade I vide Memo No.F. 1(19)1 DSE/82, dated 31.12.1984 and he served the department in the promotional post with all sincerity, devotion and to the satisfaction of the authority. He was drawing the pay scale time to time, as admissible to the post, from the date of promotion.

In the first part of January, 1998, he received Memo No. F(1)/YASKCP/19977 82627, dated 29.12.1997 and Memo No. F.1 (1)/YASKCP/831 832, dated 09.01.1998, issued by defdt. No. 1 informing him that his promotion to the post of Physical Instructor, GradeI was wrong and, therefore, his pay was refixed for the period from 01.01.1985 to 31.12.1997 and an amount Rs. 59,646/ (Rupees fifty nine thousand six hundred and forty six) only was overdrawn by him and it was directed to recover that amount from him. He made representation against the aforesaid orders but while did not get any redress, he issued notice under Section 80 of CPC and, thereafter, filed the suit in the Court of Civil Judge, Senior Division, Kailashahar, challenging those memos and prayed for setting aside and quashing those impugned Memos., dated 29.12.1997 and 09.01.1998.

3. The defdts.(appellants) contested the suit by filing written statement inter alia stating that the plaintiff was appointed to the post of Physical Instructor, GradeII, on 25.2.1983 and he was not eligible and/or due to be promoted to the post of Physical Instructor GradeI. Due to some bonafide mistake, he was promoted to the post of Physical Instructor, GradeI, on 01.01.1985 and such promotion was contrary to the Service Rules and therefore, it was liable to be rectified. It was further stated that since the plaintiff was not eligible for promotion, the department corrected the wrong by cancelling the wrong promotion order and directed recovery of the amount drawn by him.

4. The trial Court considering the pleadings of the parties framed the following issues:

- "i) Is the suit maintainable in its present form?
- ii) Is there any cause of action for this suit?
- iii) Whether the plaintiff was promoted according to rule?
- iv) Whether the plaintiff is entitled to get decree as prayed for?
- v) Are the parties entitled to get any other relief/cost?"

5. The plaintiffrespondent examined himself as PW.I and proved the documents in support of his case which were marked as Ext. 1 (series). Tie defendants adduced no evidence.

6. The learned Civil Judge, Senior Division, Kailashahar, dismissed the suit holding that the plaintiff was given promotion in violation of the Service Rules and therefore, dismissed the suit.

7. Plaintiff respondent preferred Title Appeal 22/1999 in the Court of District Judge, North Tripura, Kailashahar and by judgment and decree, dated 30.09.2002 and 19.11.2002 respectively, the Additional District Judge allowed the appeal and decreed the suit in favour of the plaintiff.

The defdts. challenging the appellate judgment and decree preferred the present second appeal.

8. This Court, by order, dated 12.11.2003, framed the following substantial question of law for decision in the appeal:

"Whether the learned lower appellate Court committed grave error of law by holding that the respondent by virtue of holding the post of Physical Instructor Gr.I for 12 years cannot be reverted even though his promotion is contrary to the Recruitment Rules?"

9. Heard learned Counsel, Mr. Paramartha Datta, for the appellants. Also heard learned counsel, Mr. D. K. Biswas, for the respondent.

10. At the outset learned counsel Mr. Biswas has made a very impressive and authoritative argument stating that the Court is required to see, at first, whether there is at all any substantial question of law for decision by this Court in this case and whether the substantial question of law formulated in this appeal may be legally termed as a question of law or not.

In support of his contention, learned counsel referred the decision of the Apex Court in the case of State Bank of India Vs. S. N. Goel: 2008 AIR SCW 4355, Chunilal Vs. Mehta Vs. Century SPG Company Ltd, Santosh Hazari Vs. Purushottam ((2001) SCW 723, (2001)) 3 SCC 179.

Relying on the principles laid down by the Apex Court in the above case laws, learned counsel Mr. Biswas has submitted that the question formulated in this appeal cannot be treated as a substantial question of law and therefore, the appeal is liable to be dismissed. Per contra, learned counsel, Mr. P. Datta has submitted that promotion of the respondent to the post of Physical Instructor, GradeI, within 1 year of his appointment from the post of Physical Instructor, GradeII, was a bonafide mistake done by department and, therefore, the department was bound to correct the wrong and recover the amount from the plaintiff and accordingly, passed the impugned orders. The promotion was contrary to the Service Rules and therefore, there was nothing wrong and the first appellate Court taken a wrong decision on the issue which is liable to be interfered.

11. Let us first see what is a substantial question of law. The Apex Court in the case of State Bank of India Vs. S. N. Goel, reported in 2008 SCW 4355, has laid down principles of determining a substantial question of law. The Apex Court held thus:

"Second appeals would tie in cases which involve substantial questions of law. The word "substantial" prefixed to "question of law" does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. "Substantial questions of law" means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties. In the context of Section 100 CPC, any question of law which affects the final decision in a case is a substantial

question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing in the final outcome, will not be a substantial question of law. Where there is a clear and settled enunciation on a question of law, by this Court or by the High Court concerned, it cannot be said that the case involves a substantial question of law. It is said that a substantial question of law arises when a question of law, which is not finally settled by this Court (or by the concerned High Court so far as the State is concerned), arises for consideration in the case. But this statement has to be understood in the correct perspective. Where there is a clear enunciation of law and the lower Court has followed or rightly applied such clear enunciation of law, obviously the case will not be considered as giving rise to a substantial question of law, even if the question of law may be one of general importance. On the other hand, if there is a clear enunciation of law by this Court (or by the concerned High Court), but the lower Court had ignored or misinterpreted or misapplied the same and correct application of the law as declared or enunciated by this Court (or the concerned high Court) would have led to a different decision, the appeal would involve a substantial question of law as between the parties. Even where there is an enunciation of law by this Court (or the concerned High Court) and the same has been followed by the lower Court, if the appellant is able to persuade the High Court that the enunciated legal position needs reconsideration, alteration, modification or clarification or that there is a need to resolve an apparent conflict between two view points, it can be said that a substantial question of law arises for consideration. There cannot, therefore, be a straitjacket definition as to when a substantial question of law arises in a case." In the case of *Chunilal Vs. Mehta Vs. Century SPG Company Ltd.* reported in AIR 1962SC1314 Apex Court has held thus: "The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties, and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussions of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be substantial question of law.

In *Santosh Hazari Vs. Purushottam*

Tiwari (2001) AIR SCW 723; (2001)3 SCC

179 the Apex Court has held thus:

To be a question of law involved in the case there must be first a foundation for it laid in the pleadings and the question should emerge from substantial findings of facts arrived at by the Court of facts and it must be necessary to decide that question of law for a just and proper decision of the case.

An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will therefore, depend on the facts and circumstances of the case whether a question of law is a substantial one and involved in the case, or that; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis." In the case of Hero Vinoth Vs. Seshammal reported in (2006)5 SCC 545 the Apex

Court has held thus:

"(i) An interference of fact from recital or contents of a document is a question of fact. But the legal effect of the terms of the document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the Suit) will be a substantial question of law, if it is not covered by any specific provision of law or settled legal principle emerging from binding precedents, but the Court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of case, the substantial question of law arises not because the law is still debatable but because of decision rendered on a material question, violated the settled position of law.

(iii) the general rule is that High Court will not interfere with the concurrent findings of the Courts below. But it is not an absolute rule, Some of the well recognized exceptions are (i) where the Courts below have ignored material evidence or acted on the no evidence (ii) the Courts have drawn wrong inferences from the proved facts by applying the law erroneously; or (iii) the Courts have wrongly cast the burden of proof. When we refer to a decision based on no evidence, but also refers to any case, where the evidence taken as a whole, is not reasonably capable of supporting the finding."

12. The position of law, as already settled, on the point is that formulating a substantial question of law must be debatable, not previously settled by law of the land or a binding precedent and answer for the same will have a material bearing on the rights of the parties before the Court. As per the provision of Section 100 of the Code of Civil Procedure, in second appeal, High Court is not entitled to reappreciate the evidence, adduced on behalf of the parties, unless it is found that the finding of the first appellate Court is perverse and not based on evidence available on record. It has also been settled that perversity itself is a substantial question worth adjudication. What is required is a categorical finding on the part of the High Court as to the perversity.

13. In the case in hand the plaintiffrespondent was appointed as a Physical Instructor, GradeII by the appellants, on 25.02.1983. He was promoted to the post of Physical instructor, GradeI vide order, dated 31.12.1984 and he hold the promotional post w.e.f. 01.01.1985. Service career of the plaintiff was without blemish and he rendered exceptional, faithful, devoted and unblemished service to the satisfaction of the defendants in the promotional post. All on a sudden, after 13 years of such service, the appellants vide memo, dated 29.12.1997 and 09.01.1998 informed the plaintiff that his promotion was wrong, contrary to the Service Rules, and therefore, directed recovery of the amount of Rs. 59,946/ treating the same as overdrawn during the period from 01.01.1992 to 31.12.1997. The trial Court, taking into consideration the Service Rules, dismissed the suit of the plaintiff. Subsequently, the appellate Court considered the evidence on record and held that the order passed by the trial Court was wrong, violative of the principles of natural justice and, therefore, set aside the judgment and decree, passed by the trial Court and decreed the suit in favour of the plaintiff.

14. Learned counsel, Mr. Biswas, submitted that the plaintiff respondent rendered unblemished and exceptional service to the post in which he was promoted and there was nothing wrong done by the plaintiff and that without even affording an opportunity to the plaintiffrespondent to show cause, the defendantappellants issued the impugned memorandum, dated 29.12,1997 and 09.01.1998 and therefore, the decision taken by the first appellate Court, based on the facts and circumstances, cannot be interfered in a second appeal.

15. Learned counsel, Mr. Datta for the appellants has submitted that the promotion order of the plaintiff was contrary to the Service Rules and, therefore, that order cannot sustain. He however, admitted that while issuing the impugned memos, no show cause notice was served on the plaintiff. Since the promotion order was wrongly issued by mistake, the defendants corrected the mistake and therefore, the judgment and decree, passed by the first appellate Court, was wrong in interfering with the judgment and decree passed by the trial Court and this Court, should interfere in the judgment of the first appellate Court.

The Recruitment Rule has been annexed by the appellants as "AnnexureD" to the memo of appeal. The Rule was notified, on 06.07.1983, vde notification No. F. 1 (227)DHE/80 of the Education Department, Government of Tripura.

Learned counset Mr. Datta in course of argument drawn my attention to Column 11 of the Schedute to the notification which prescribes thus:

11. In case of recruitment by promotion/transfer, grades from which promotion to be made.

Promotion

From matriculate or equivalent Physical Instructor GradeII with 10 (ten) years experience in the field and nonmatric Physical Instructor GradeII with 15 (fifteen)

yrs. experience in the field.

16. The Rule shows that the post of Physical Instructor, GradeI is a promotional post to be filled up from the Physical Instructor, GradeII with 10 years experience, having Educational Qualification Matriculate or equivalent and 15 years experience in the case of nonMatriculate Physical Instructor, GradeII. It is admitted position that the plaintiff was promoted to GradeI post, within 2 years of his appointment in the post of Physical Instructor, GradeII and that means he was not eligible to be promoted at that time. The promotion order was made by the defendants. There was no hand of plaintiff in it. Under what circumstances that promotion order was made, ignoring the Rules, has not been explained or detailed by the defendants. No evidence adduced as to what was the mistake and who have done the mistake while giving the promotion order and fixing the salary of the plaintiff to the promotional post.

Admittedly, the plaintiff rendered unblemished service for more than 13 years and thereafter, the defdts. issued the impugned memos stating that the promotional order was wrong and directed the plaintiff to return the amount which the plaintiff had drawn while holding the promotional post. Such decision of the defendants, after elapsed of such long time, can in no way be termed as an order in the public interest and therefore, liable to be interfered by the Court of Law. It is an order against the principles of equity and good conscience.

17. The Apex Court in the case of M. A. Hamid Vs. State of Andhra Pradesh & Ors. reported in (2001) 9 SCC 261 has held that reversion of the appellant after he hold the higher post for more than a decade was wholly unjustified.

The appellants passed the promotion order definitely under some exigencies ignoring the Rules. Now, after 13 years of service, rendered by the respondent, the appellants cannot take a stand just saying that it was a mistaken decision and the plaintiff responder it is liable to be reverted back and the salary paid to him for holding the promotional post should be recovered from him.

The trial Court purportedly, without considering the merit and evidence adduced by the paintiff, dismissed the suit only basing on the provisions of the Recruitment Rule. As I find, taking into consideration the total gamut of the facts and circumstances and the evidence adduced by the plaintiff the first appellate Court taken the decision which does not call for interference in second appeal. There is no substantial question of law involved in the decision. In the facts and evidence on record the decision cannot be said to have suffered from perversity or violative of any express provision of law. The appeal, therefore, stands dismissed. However, in the facts and circumstances of the case, there shall be no order as to cost.

18. Send back the LC records along with a copy of this judgment.

19. Prepare appellate decree accordingly.